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Citation for published version:

Andreangeli, A 2017, 'Competition law and fundamental rights', *Journal of European Competition Law & Practice*, pp. 1-15. <https://doi.org/10.1093/jeclap/lpx050>

Digital Object Identifier (DOI):

[10.1093/jeclap/lpx050](https://doi.org/10.1093/jeclap/lpx050)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Journal of European Competition Law & Practice

Publisher Rights Statement:

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Key points

- This survey covers the following rights: right to a fair hearing and to an effective judicial remedy (Article 47, EU Charter of Fundamental Rights—hereinafter referred to as CFR); right to good administration (Article 41 CFR); right to equal treatment, (Article 20 CFR); the presumption of innocence (Article 48 CFR); the principle of *nulla poena sine lege* (Article 49 CFR); the right to privacy (Article 7 CFR).
- In the *Evonik Degussa* appeal judgment the Court of Justice rules on the remit of the expectation of confidentiality concerning leniency documents and on the interplay between the right to privacy and the demands of transparency of the EU Commission's action.
- In the *FSL* judgment the Court of Justice ruled that the EU Commission is entitled to rely on information received by national tax authorities for the purpose of investigating a competition infringement, provided that the information was obtained in accordance with the applicable domestic procedural laws.
- In the *Janssen Cilag* judgment the European Court of Human Rights examined the compatibility of the search-and-seizure powers, enjoyed by the French Competition Authority, with Article 8 ECHR (right to privacy and to the inviolability of the 'home'), including the power to seize documents *prima facie* covered by legal professional privilege.
- The issues arising from parent/subsidiary liability and the more general question of whether and in which cases antitrust liability should extend to non-cartel participants were addressed once again in *E-Turas* and in the *Toshiba and AKZO Nobel* appeals.
- *Roca Sanitario* and *Timab* addressed issues of fairness and equal treatment in the assessment of fines, both in the context of infringement proceedings and in relation to settlement negotiations.
- The scope of the right to be heard in merger cases was brought to the attention of the General Court in the *UPS* appeal.

1. Introduction

The purpose of this article is to briefly analyse developments in the case law of the EU Court of Justice concerning the application of human rights' standards in the context of the enforcement of the EU competition rules that have occurred in 2016 and 2017. As will be illustrated below, there have been a number of significant decisions handed down in this area, ranging from judgments ascertaining that the EU Commission and the EU Courts themselves had failed to determine whether there had been an infringement of the Treaty antitrust rules "within a reasonable time" to decisions elaborating on the meaning and scope of the presumption of innocence in complex cartel cases, to cases delving once again on issues of liability of parent companies for conduct of their own subsidiaries. The Luxembourg courts have also continued to engage with the review of competition fines and in this context the Court of Justice has carefully redesigned the scope of its appellate jurisdiction vis-à-vis the General Court's exercise of its unlimited jurisdiction in accordance with Article 23 of Council Regulation No 1/2003. Recent pronouncements have once again touched upon evidentiary issues, such as those arising from the complex relation between the demands of a "fair hearing" and the need to maintain the confidentiality of "delicate" documents, such as those

* Edinburgh Law School, University of Edinburgh. The author gratefully acknowledges the feedback received by Dr Robert Lane on an earlier draft of this paper. The usual disclaimer applies.

submitted as part of a leniency application and questions arising from the exercise of the power to exchange of information within the European Competition Network (ECN).

2. Issues of confidentiality of evidence: Evonik Degussa and FSL

2.1. Between transparency and effective enforcement—leniency documents and infringement decision

Maintaining the secrecy of leniency documents has been a key priority for the EU Commission as well as, generally, for all competition agencies since the establishment of whistleblowing programmes and was recognised by the Court of Justice itself in, among other decisions, the *Pfleiderer* preliminary ruling.¹ It was held that without a commitment to maintaining the confidentiality of such statements, prospective applicants, on the one hand, would be deterred from coming forward with details on secret cartels and, on the other hand, the competition agencies would be deprived of a useful instrument for combating restrictive behaviour.² This principle is not, however, absolute but may be limited on the basis of equally weighty interests, linked to ensuring that the right to obtain compensation for antitrust damages would remain “practical and effective.”³

It is acknowledged that the 2014 Directive on Antitrust Damages has endeavoured to protect these statements in the course of proceedings pending before national courts by placing a blanket ban on their disclosure. Nonetheless, this principle is only applicable to requests made during civil litigation in the member states. Consequently, could an undertaking who has blown the whistle as regards a cartel with the EU Commission be able to oppose the outright disclosure, for instance, of parts of their application that are contained in the final infringement decision that is made public?

This is the question that the Court of Justice had to deal with in the *Evonik Degussa* case, concerning an appeal against the decision not to grant confidential treatment to information contained in a leniency application that had found its way into the published version of an infringement decision.⁴ In the judgment, the Court of Justice drew a distinction between “(...)the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency (...)” and that of “verbatim quotations from that statement itself”:⁵ whereas the former could be published even in the “non-confidential” version of the decision, after any reference to the source had been eliminated to satisfy requirements of confidentiality, the former would be protected outright from disclosure.⁶ It was explained that since the information published in the public, “extended” version of the infringement decision concerned only “the elements constituting the infringement of Article 101 TFEU” that had been ascertained as a result of the proceedings and did not therefore allow for the identification of the applicant, it would not have been protected from publication.⁷

The Court of Justice also took the opportunity to clarify the question of whether the right to privacy, enshrined in Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights could reinforce the expectation of confidentiality held by leniency applicants vis-à-vis all or part of their statements. It was held that since the information being published was “(...)of direct relevance to the elements constituting the infringement” only, this fundamental right could not “prevent the disclosure of information which, like that whose publication is envisaged in the present case, concerns an undertaking’s participation in an infringement of EU law relating to cartels”.⁸ In the

¹ Case C-360/99, *Pfleiderer v Bundeskartellamt*, [2011] ECR I-5161, para. 26.

² *Id.*, para. 27; see also para. 24-25.

³ Case C-536/11, *Donau Chemie*, [2013] ECR I-366, para. 23-24; see also para. 31-33.

⁴ Case C-162/15P, *Evonik Degussa v Commission*, judgment of 14 March 2017, [2017] ECR I-2015.

⁵ *Id.*, para. 87.

⁶ *Ibid.*

⁷ *Id.*, para. 96; see also para. 84.

⁸ *Id.*, para. 118.

Court's view, the applicant could not rely on its right to privacy in order to "(...) complain of a loss of reputation which is the foreseeable consequence of his own actions. (...)")⁹

In light of the forgoing it is argued that with Evonik Degussa the Court of Justice has sought to define more sharply the scope of the legitimate expectation of confidentiality attached to leniency statements, by drawing a relatively neat distinction between extracts from such documents that allow for the identification of the applicant, and are therefore shielded from all disclosure in order not to jeopardise the effectiveness of the promise of immunity, and those who instead are "merely factual" and restricted to illustrating the key elements of a cartel.¹⁰

It is added that this approach is consistent with the case law of the European Court of Human Rights concerning cases when an individual seeks to rely on the right to privacy as a means of avoiding the "loss of reputation" that stems from having committed a criminal offence. The Strasbourg court held in, inter alia, *Gillberg v Sweden*, that Article 8 of the Convention would not shield an individual from prosecution stemming from conduct that, e.g., contravened the applicant's duties as public official, on the ground that in this case any criminal sanctions would be regarded as a "likely repercussion" of the applicant's conduct on his or her reputation.¹¹

Overall, it may be concluded that while leniency applicants are entitled to an expectation of secrecy as regards the content of statements made in order to seek immunity from fines, there are specific limits as to the scope of this entitlement: to the extent that protection from disclosure for leniency pleas is aimed at protecting applicants from the threat of civil liability, only statements that allow for their identification will be shielded from any disclosure. The same, however, will not apply to elements of a leniency statement that only concerns "factual features" of cartel behaviour. To hold otherwise would go as far as to protect the applicant from the foreseeable consequences of their unlawful conduct and thereby impinge upon other interests worthy of protection, such as, among others, the legitimate interest to the transparency of the EU Commission's decision making.

2.2. Which due process standards? Article 12 of Council Regulation No 1/2003 and the reach of the right to a "fair hearing"

The powers enjoyed by the EU Commission and by each of the NCAs to exchange and use in evidence documents gathered in the course of competition investigations has raised significant questions as to the compatibility of this aspect of the decentralised enforcement of the Treaty antitrust rules with due process standards. It has been argued that, although Regulation No 1/2003 is predicated upon the "equivalent protection" of these rights across the Union as a whole,¹² there are significant differences among the rules governing the taking of evidence in each jurisdiction as well as regards the admissibility of that evidence as a means of proving a competition infringement.¹³ It has been suggested that evidence is lawfully transmitted to a different NCA, and the latter can therefore rely on it as proof of a competition breach, if the agency charged with gathering it has complied with the rules on the taking and admissibility of documents and other evidentiary material in force in its own jurisdiction:¹⁴ this view is supported by the EU Commission itself.¹⁵ However, it has also been argued that allowing for the de facto "free flow of evidence"

⁹ Id., para. 117.

¹⁰ Id., para. 84-85; see also Opinion of AG Szpunar, para. 121-123.

¹¹ Appl. No 41723/06, *Gillberg v Sweden*, judgment of 3 April 2012 (Grand Chamber), available on HUDOC at: <http://hudoc.echr.coe.int/eng?i=001-110144>, para. 68-70. Cf. *Degussa*, cit. (fn. 4), para. 83-84.

¹² See recital 16, Preamble to Council Regulation No 1/2003 of 16 December 2002, [2003] OJ L1/1.

¹³ See e.g., inter alia Andreangeli, "The impact of the Modernisation regulation on the guarantees of due process in competition proceedings", (2006) 31(3) *ELRev* 342, pp. 353-354.

¹⁴ See e.g. Bloom, "Exchange of confidential information among members of the EU network of competition authorities", in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2002: Constructing the Network of Competition Authorities* (Hart Publishing, Oxford/Portland, Oregon, 2004), p. 389 at 399.

¹⁵ Commission Notice on cooperation within the network of competition authorities (hereinafter referred to as Network Notice), [2004] OJ C/101/43, para. 27. For commentary see e.g. Lage and Brokelmann, "The possible

within the ECN on the basis of a mere assumption that the safeguards of fairness and the rights of the defence can be regarded as “sufficiently equivalent” and without necessarily testing whether this is actually the case may lead to the “weakening” of important procedural guarantees.¹⁶

In the face of these concerns, it is not surprising that the recent *FSL* litigation, concerning the possibility for the Commission to use as evidence of a competition infringement documents received by domestic tax authorities would attract some attention. The case concerned an appeal brought against the EU Commission decision finding the existence of a cartel on the Italian market for bananas.¹⁷ The applicant, one of the co-cartelists, challenged the infringement decision on the ground that, inter alia, the Commission had relied on evidence that had been transmitted to it by the Italian fiscal authorities: in the applicant’s view, since the documents in question had been gathered “solely” for the purpose of establishing a breach of the national tax rules, they could not then be deployed in EU competition proceedings to find an infringement of Article 101 TFEU.¹⁸

The General Court, however, rejected this plea: it was observed that since questions of admissibility of evidence gathered in the member states’ jurisdictions were regulated by national law and consequently, unless a domestic court had ruled the taking of such evidence as unlawful, the EU judiciary could not regard that evidence as inadmissible without violating the confines of its own jurisdiction.¹⁹ The judgment acknowledged that the rights of the defence of the investigated parties belonged to the general principles of EU law and should therefore be observed by the EU Commission throughout its proceedings.²⁰ However, the General Court took the view that the scope of these rights should have been determined in the broader context of Council regulation No 1/2003, whose overarching aim was to put an end to the “centralised” enforcement of Articles 101 and 102 by promoting the “close cooperation” of the Commission and the national authorities.²¹

In light of the forgoing, the General Court took the view that the Commission had acted within the remit of its powers when it had relied on evidence received by the Italian tax authorities in the course of its competition enforcement proceedings. While the goal of Article 12 was to regulate the “flow of information” among the members of the ECN by setting out certain minimum requirements governing the use of that information, such as the stipulation that evidence so obtained could not be used for a purpose other than the enforcement of the Treaty competition rules,²² the same provision could not be read as to provide a general ban on “(...) the use as evidence, by the Commission, of information obtained by another national authority in exercise of its tasks.”²³ Unless the applicant could have shown that a national court had ruled the documents at issue as inadmissible, according to the applicable national rules, the Commission could have relied on them in its competition proceedings without infringing the applicant’s rights of defence.²⁴

It is suggested that the *FSL* judgment was not entirely surprising since it confirmed both the ongoing commitment to the principle of national autonomy as regards the determination of questions of admissibility of evidence, as well as emphasising the need to uphold the full effect of

consequences of a relatively broad scope for exchange of confidential information on national procedural law and antitrust sanctions”, in Ehlermann and Atanasiu (eds), cit. (fn. 14), p.405 at 412; cf. Bloom, cit. (fn. 14), p. 398-399.

¹⁶ See e.g. Waelbroeck, “ ‘Twelve feet dangling down and six necks exceeding long’. The EU network of competition authorities and the European Convention on Fundamental Rights”, in Ehlermann and Atanasiu (eds), cit. (fn. 14), p. 465 at 483; see also, inter alia Andreangeli, cit. (fn. 13), pp. 354-356.

¹⁷ Case T-655/11, *FSL and others v Commission*, [2015] ECR II-383.

¹⁸ Id., para. 41.

¹⁹ Id., para. 45-46.

²⁰ Id., para. 50.

²¹ Id., para. 75.

²² Id., para. 76, 78.

²³ Id., para. 78.

²⁴ Id., para. 81-82.

Article 12 of the Modernisation Regulation.²⁵ However, it could be argued that, by “leaving it to national law” to define the exact confines of the power to exchange and use as evidence information gathered in other jurisdiction, it seems to stoke up concerns that resorting to this form of cooperation could lead to uncertainty—if not to the weakening of—as regards the standards of protection to be afforded to important due process rights, such as the right against self-incrimination, whose scope may well vary from one jurisdiction to another.²⁶

The decision was appealed and on 17 November 2016 AG Kokott delivered her opinion which confirmed the conclusions of the General Court.²⁷ She expressed the view that “(...) the existence of an antitrust offence can be demonstrated by any appropriate evidence”.²⁸ Thus, unless certain forms of proof are expressly excluded, either because they had been obtained in disregard of an essential procedural requirement aimed at safeguarding the investigated parties or had been deployed for an unlawful purpose, there should be no limit to the ability of the Commission or of the NCAs to rely on any evidence in order to establish the breach of the EU competition rules.²⁹ On this basis, the Advocate General, concurring with the General Court, expressed the view that because the transmission of the evidence in issue had neither been prohibited by the competent national courts nor gathered by the competent authorities in defiance of a “prohibition on use”, the Commission had been fully entitled to include the documents in issue in the file. In her Opinion, she stated that Article 12 should not be read as implying that “the only evidence that may be used in antitrust proceedings is that which has already been gathered for the purposes of such proceedings”.³⁰ To hold otherwise would not only unduly impair the effectiveness of the cooperation rules but would also impair the scope of the principle of national autonomy.³¹ On this basis, AG Kokott expressed the view that since there was no reason to conclude that the standards under which the Italian Tax authorities had gathered the affected evidence were any less stringent than those available to the investigated parties under EU competition law,³² the Commission had not infringed the limits of its powers under Article 12.³³

On 27 April 2017 the Court of Justice handed down its judgment, which upheld the first instance decision: the Court, agreeing broadly with the AG’s Opinion, held that “(...) Article 12 of Regulation No 1/2003 pursues the specific objective of (...) encouraging cooperation between the authorities within the European Competition Network by facilitating the exchange of information” and for that purpose conferred on the Commission and its domestic partners “(...) the power to provide one another with, and use in evidence, any matter of fact or of law, including confidential information (...)”.³⁴ It therefore refused, as the Advocate General had done, to read into this provision “(...) a more general rule preventing the Commission from using information transmitted by national authorities other than the Member States’ competition authorities on the sole ground that that information was obtained for other purposes.”³⁵ It was therefore concluded that since the evidence

²⁵ See e.g., *mutatis mutandis*, Rizzuto, “Parallel competence and the power of the EC Commission under Regulation 1/2003 according to the Court of First Instance”, (2008) 29(5) ECLR 286 at 289-290.

²⁶ See *inter alia* Andreangeli, *cit.* (fn. 13), p. 351-352, 363; also, *mutatis mutandis*, Rizzuto, “The procedural implication of Pfleiderer for the private enforcement of European Union competition law in follow-up actions for damages”, (2011) GCLR 116, pp. 118-120.

²⁷ Case C-469/15, *FSL v Commission*, Opinion of AG Kokott, 17 November 2016.

²⁸ *Id.*, para. 31.

²⁹ *Ibid.*; see also para. 32.

³⁰ *Id.*, para. 47; see also para. 35.

³¹ *Id.*, para. 46.

³² *Id.*, para. 50.

³³ *Id.*, para. 51; see also para. 62.

³⁴ Judgment of the Court of Justice of 27 April 2017, not yet reported, para. 34.

³⁵ *Id.*, para. 35.

being transmitted had been gathered in compliance with the relevant national law³⁶ and the investigated parties had been able to rely fully on their right to be heard and have access to the Commission's file after the notification of the statement of objections,³⁷ the Commission had not acted outside the limits of the powers conferred to it by Article 12 of Regulation 1/2003.³⁸

It is submitted that the importance of the FSL judgment cannot be understated. It is argued that both AG Kokott's Opinion and the Court of Justice's conclusions disclose a clear "enforcement driven" approach to the rules governing the exchange and use as evidence of documents gathered by the members of the ECN. While the interpretation of Article 12 adopted in FSL is likely to boost arguments in favour of adopting a proactive stance to the investigation of new *prima facie* competition infringements, it nonetheless leaves open long-standing questions as to the extent to which it may strike an appropriate balance between the demands of deterrence of new antitrust breaches and the need to afford adequate protection to the rights of the defence and more widely of the right to a "fair trial" in competition cases at EU level.

2.3. Search and seizure powers in competition investigations: the European Court of Human Rights speaks once again

The question of human rights' compatibility of the search and seizure powers that the EU Commission and its national partners enjoy in competition investigations has been a vexed one. According to long-standing CJEU's jurisprudence, the power to inspect premises of undertakings reasonably suspected of having infringed the competition rules and in that context to seize any documents, including those in electronic form remains consistent with the right to the inviolability of the undertaking's "home", provided by Articles 7 of the EU CFR and 8 of the ECHR on the ground that the legislative framework enshrined in Articles 18 and 20 of Council Regulation No 1/2003 provides sufficient protection of the investigated parties against "arbitrary or disproportionate intervention" by the EU Commission.³⁹ Furthermore, the EU *acquis* confers to the concerned undertakings a limited right to the confidentiality of communications with their legal advisers, on condition that the latter are independent and authorised to practice in one of the member states and the communications in issue concern the exercise of the undertaking's rights of defence.⁴⁰

Having regard to the legality of search and seizure powers, the Court of Justice observed in *inter alia* the Dow Benelux judgment that the Commission could only order such measures upon a "reasonable suspicion", was obliged to provide adequate reasoning in its decision or authorisation and in that context had to justify the proportionality of the scope of the measure *vis-à-vis* the remit of the investigation.⁴¹ It further added that the parties affected by the search and seizure enjoyed the right to legal representation and could appeal the decision ordering the investigative measure.⁴² The Court concluded that even in the absence of a judicial authorisation for such a search, the Commission's powers remained consistent with entitlements to privacy and inviolability of private premises.⁴³ In addition, should domestic law require that the competition authorities aiming to search private premises seek a judicial authorisation in national courts, the latter will be entitled to carry out a review of the "authenticity" of the decision adopted by the EU Commission for this purpose and to decide whether the inspection is neither arbitrary nor disproportionate in light of the

³⁶ *Id.*, para. 32.

³⁷ *Id.*, para. 44; see also para. 40 and 42.

³⁸ *Id.*, para. 42, 45-46.

³⁹ Ortiz Blanco (ed), *EU Competition procedure*, 3rd edition, 2013, OUP, p. 320.

⁴⁰ Case 155/79, *AM & S Europe v Commission*, [1982] ECR 1575, paras. 18-27; also case T-125/03, *AKZO Nobel and others v Commission*, [2007] ECR II-3523, para. 79 ff.

⁴¹ Case 99/87, *Dow Benelux and others v Commission*, 1989] ECR 3137, para. 26.

⁴² *Id.*, para. 17. See also, *mutatis mutandis*, case 46/87, *Hoechst v Commission*, [1989] ECR 2985, para. 29-30.

⁴³ Case 99/87, *cit.* (fn. 41), para. 18; also case T-125/03, *cit.* (fn. 40), para. 27.

subject matter of the case.⁴⁴ Nonetheless, the domestic court cannot question the “necessity” of the measure or ask for access to the case file, although it can seek “further explanations” from the Commission, especially as regards the “reasonable suspicion” prompting the inspection,⁴⁵ it being only for the EU Courts to review the validity of the measure ordering the investigative measure.⁴⁶

Similar questions have also arisen in individual member states, making their way to the European Court of Human Rights.⁴⁷ In *Janssen Cilag v France*, decided in March 2017⁴⁸ the applicant had alleged that the French competition agency had infringed its right to privacy by entering its premises and seizing documents, some of which were in electronic format,⁴⁹ by carrying out a “fishing expedition” and taking away communications with the investigated party’s lawyers.⁵⁰ Following an appeal to the competent court (the Court of Appeal in Paris), the applicant petitioned the Human Rights Court: the Court however found no infringement of Article 8 of the Convention. It held that the French competition authority had acted in a manner that was both consistent with the applicable domestic law and proportionate to the legitimate aim that the latter pursued.⁵¹ In its view, the decision ordering the search had set out clearly its scope and its implementation had been assisted by several safeguards, including the right to have a lawyer present at the inspection and the possibility to appeal the decision ordering the inspection and the seizure of documents.⁵²

As to the allegation that the measure in issue had infringed the applicant’s right to lawyer-client confidentiality, the Strasbourg Court observed that the assessment of the nature—whether privileged or otherwise—of documents seized in the course of on-the-spot inspections could only occur ‘after the event’ and that, to comply with the ECHR, could only be carried out by a judge who had to be allowed to assess the nature of the communications and the overall proportionality of the scope of the seizure vis-à-vis the remit of the investigation and to order the restitution of any privileged evidence.⁵³ In light of the foregoing the Human Rights Court, in rejecting the plea, held that, on the one hand, the applicant’s representatives had been able to contest the nature of the documents to prevent their taking and to highlight those that in their view were privileged.⁵⁴ And on the other hand the court had engaged in a careful and extensive examination of the documents in respect of which legal privilege had been claimed and could have ordered their restitution, had they been so protected.⁵⁵

It is submitted that the *Janssen Cilag* judgment appears to confirm much of the existing *acquis* concerning the human rights’ compliance of the inspection powers enjoyed by competition agencies due the emphasis it placed on the need to look at the whole set of procedural safeguards assisting these measures and aimed to protect the position of the investigated parties.⁵⁶ It is also suggested that this decision is going to “reassure” the EU Commission: having regard especially to issues of legal professional privilege, it is argued that the current procedural arrangements enshrined in the *AKZO Nobel* judgment, which oblige the Commission to place any “contested” documents in a sealed envelope so that a decision on their status can be taken by the General Court,⁵⁷ are likely to comply with the interpretation of Article 8 ECHR adopted in *Janssen* by the European Court of Human

⁴⁴ Case C-94/00, *Roquette Freres*, [2002] ECR I-9011, para. 49, 52.

⁴⁵ *Id.*, para. 52 and 61; see also Article 20(8), Council Regulation No 1/2003.

⁴⁶ *Roquette Freres*, cit. (fn. 44), para. 67-68.

⁴⁷ See e.g. appl. No 37971/97, *Colas Est v France*, [2004] 39 EHRR 17, especially paras. 48-49.

⁴⁸ Appl. No 33931/12, *Janssen Cilag SA v Commission*, judgment of 21 March 2017, not yet reported.

⁴⁹ *Id.*, para. 14.

⁵⁰ *Ibid.*

⁵¹ *Id.*, para. 19; see also para. 23.

⁵² *Id.*, para. 20-21.

⁵³ *Id.*, para. 19.

⁵⁴ *Id.*, para. 21-22.

⁵⁵ *Id.*, para. 22-23.

⁵⁶ *Ibid.*; for commentary, see inter alia Ortiz Blanco, cit. (fn. 39), pp. 320-322.

⁵⁷ Case T-125/03, cit. (fn. 40), para. 79-83; see also para. 87-89.

Rights, to the extent that only the Luxembourg first instance judges can examine these documents and decide whether they can be included in the case file.⁵⁸

3. Liability for actions of third parties and its interplay with the presumption of innocence

3.1. Parent/subsidiary relations and EU competition sanctions: who pays?

The most recent court practice has also had to deal with ongoing questions arising from the application of the notion of “single economic entity” for the purpose of determining the identity of the undertaking liable for the penalties imposed as a result of a competition infringement. This is an area that has attracted significant controversy: it is recognised that the presumption that a parent company should be liable for the consequences of a breach of the competition rules committed by its 100%-owned subsidiary, unless it could be shown that it could exercise no “decisive influence” on the latter, is now well-established.⁵⁹ Nonetheless, questions as to whether this principle would be compatible with human rights safeguards such as the rule that “criminal” liability be personal have continued to emerge. This appears to be the case especially when the parent company may hold a shareholding of less than 100%—perhaps together with a co-owner—into the capital of a company that has infringed the competition rules.⁶⁰

In the recent *Degussa* case, the Court of Justice held that it is incumbent on the EU judiciary “(...) when it examines whether the presumption of actual exercise of decisive influence is rebutted, [to] take into consideration all the evidence submitted to it”,⁶¹ in light of, *inter alia*, the “existence of a specific instruction” relayed to the subsidiary would be relevant, even when the subsidiary did not in fact fully adhere to the parent company’s orders.⁶² These principles have recently been reiterated by the Court of Justice in its judgments concerning, respectively, the *Toshiba* and the *AKZO Nobel (Re: Heat Stabilisers Cartel)* appeals. In the *AKZO* judgment⁶³ the Court of Justice examined whether the circumstance that “the Commission’s power to impose penalties is time-barred in relation of certain subsidiaries” may in any way affect the liability for fines imposed on their parent company.⁶⁴ In *Toshiba* the Court of Justice,⁶⁵ after reiterating that the existence of the liability of a parent company for actions imputable to its subsidiary should be dependent upon an assessment of “all the relevant factors relating to the economic organisation and legal links” within the corporate group in consideration,⁶⁶ examined how these principles should apply in a situation where the subsidiary that had been directly responsible for anti-competitive behaviour was jointly owned by two distinct undertakings.⁶⁷

The Court of Justice held that if it emerged from “the statutory provisions or contractual stipulations governing” the subsidiary in question that its action on the market was “determined jointly by its parent companies”, it would have been reasonable to conclude that the latter had exercised a joint, decisive influence over the subsidiary,⁶⁸ unless the parties could adduce evidence to disprove the existence of such influence.⁶⁹ In this context, the fact that one of the parent companies had in fact never exercised certain aspects of such “decisive influence”, by relying on,

⁵⁸ *Id.*, para. 82-85.

⁵⁹ See *inter alia* case C-97/08 P, *Akzo Nobel v Commission*, [2009] ECR I-536, e.g. para. 58 ff.

⁶⁰ See *inter alia* case C-179/12 P, *Dow Chemical Co v Commission*, [2013] ECR I-605, para. 53-55.

⁶¹ Case C-155/14, *Evonik Degussa v Commission*, [2015] ECR I-529, para. 39.

⁶² *Id.*, para. 40-41.

⁶³ Case C-516/15 P, *Akzo Nobel and Others v Commission*, judgment of 27 April 2017, not yet reported.

⁶⁴ *Id.*, per AG Wahl, opinion of 21 April 2016, not yet reported, para. 49.

⁶⁵ Case C-623/15 P, *Toshiba v Commission*, judgment of 18 January 2017, not yet reported.

⁶⁶ *Id.*, para. 66.

⁶⁷ *Id.*, para. 48.

⁶⁸ *Id.*, para. 51.

⁶⁹ *Id.*, para. 52.

e.g., any veto rights over key decisions of the subsidiary, could not have been read as altering in any way the conclusion that it could significantly affect the action of its subsidiary on the market.⁷⁰

In the AKZO Nobel appeal, the Court of Justice confirmed the General Court's decision and took the view, just as AG Wahl had done in his opinion,⁷¹ that the liability of the parent company in these circumstances should be regarded as "derivative".⁷² In other words, according to the Court of Justice, since "the parent company's liability arises from its subsidiary's unlawful conduct, which is attributed to the parent company in view of the economic unit formed by those companies", it remains "inextricably linked" to the subsidiary's behaviour.⁷³ In order to assess the existence or otherwise of this "derivative liability", regard must be had to the circumstances of the case and in particular to whether the parent company had in fact had the opportunity to exercise decisive influence on the conduct of the subsidiary in the time in which the infringing practices had been implemented or had participated directly in them.⁷⁴

On this basis, the Court acknowledged that "(...) in a situation in which no factor individually reflects the conduct for which the parent company is held liable, the reduction of the amount of the fine imposed on the subsidiary jointly and severally with its parent company must, in principle, (...) be extended to the parent company".⁷⁵ However, it also observed that there may be cases in which the Commission, even though it may have been precluded from sanctioning a subsidiary due to the lapse of time, could still inflict financial penalties on the parent company.⁷⁶ On this basis, the Court of Justice concluded that AKZO Nobel could be sanctioned for a competition infringement that was *prima facie* imputable to its subsidiary, even though the Commission's powers had been time barred *vis-à-vis* the latter.⁷⁷

The Court emphasised that AKZO, as parent company, had participated to the implementation of the initial stages of the cartel and, even after taking a more "passive role", it had exercised "decisive influence" over its subsidiary in later phases of the cartel's operation.⁷⁸ Thus, it held that AKZO's liability could not be excluded merely on the ground that the Commission had been time-barred from sanctioning its subsidiary: in the Court's view, "(...) factors specific to the parent company may justify assessing the parent company's liability and that of its subsidiary differently, even if the liability of the former is based exclusively on the unlawful conduct of the latter."⁷⁹ It followed that, to the extent that AKZO had participated to the first infringement of Article 101 TFEU "of its own accord" and had thereafter remained involved in other aspects of the collusive practice as part of the same "economic unit" as its subsidiaries, it could have been sanctioned by the EU Commission, even though the latter could no longer inflict penalties on the other companies due to the lapse of time.⁸⁰

It is suggested that the Opinion in AKZO and the appeal decision in Toshiba are of considerable significance in the Court of Justice's approach to the joint and several liability of parent and subsidiary companies. In respect to the former, it is argued that the Court of Justice has gone some way toward defining the implications of the "derivative liability" of parent companies *vis-à-vis* action of their subsidiaries, by suggesting a framework for the assessment of its scope, in light of the circumstances of the case.⁸¹ As regards the Toshiba judgment, it is suggested that this decision

⁷⁰ *Id.*, para. 72-73.

⁷¹ Case C-516/15 P, *Akzo Nobel and Others v Commission*, Opinion of AG Wahl of 21 December 2016, not yet reported, para. 66.

⁷² Case C-516/15 P, judgment of 27 April 2017, para. 61.

⁷³ *Ibid.*

⁷⁴ *Id.*, para. 64-67.

⁷⁵ *Id.*, para. 62.

⁷⁶ *Id.*, para. 63; see also para. 71-72.

⁷⁷ *Id.*, para. 71.

⁷⁸ *Id.*, para. 72-73.

⁷⁹ *Id.*, para. 74.

⁸⁰ *Id.*, para. 75. Cf. AG Wahl's Opinion, paras. 82-86.

⁸¹ See paras. 71-76 of the judgment; cf. per AG Wahl, para. 69, 86.

confirms the need to carry out an objective assessment of the existence of the ability of the parent to exert decisive influence over the subsidiary, in light of, *inter alia*, any contractual provisions governing the corporate relationships within a specific corporate group.⁸²

It may therefore be concluded that the Court of Justice seems to have become increasingly aware of the need to engender greater clarity as regards the applicability of this derogation from the principle that liability from fines be “personal” to the infringer. By emphasising the importance of carrying out a careful judicial scrutiny of the effective nature of the links between parent companies and subsidiaries the Court of Justice appears to have become more attuned to the need to lay out carefully defined boundaries around the scope of the “derivative” liability of parent companies, so that the need to punish effectively individual infringers does not unduly hamper the continuing observance of principles of fairness.

3.2. Non-competitor cartel liability: when can an “intermediary” be held responsible for a competition infringement? The E-Turas ruling

Parent-subsidiary liability is not the only area in which the Court of Justice has had to address questions relating to the extent to which the consequences of complex anti-competitive practices should be attributed to undertakings different from the actual infringers of the EU antitrust rules. Similar issues can also arise when cartel members may have relied on the “services” of a third party in the implementation of an anti-competitive arrangement as in the recent E-Turas preliminary ruling. The EU Court of Justice was asked to decide whether an online travel agent, whose information system had been used by travel agents in order to, *inter alia*, agree that discounts on travel packages should be capped and to give effect to that decision by modifying the affected prices, should also be regarded as having breached Article 101 TFEU⁸³ if it had “despatched” the message in the course of its economic activity.⁸⁴ In particular, would it be compatible with the presumption of innocence to reach such a conclusion without first ascertaining the existence of sufficiently “objective and consistent” indicia and other evidence confirming that the undertaking in question had been aware or ought to have been aware of the content of the message?⁸⁵

The Court of Justice acknowledged that if an undertaking had remained “active in the market” after having participated in a collusive strategy that involved the exchange of secret information it could be concluded that they had participated in the implementation of the restrictive practice.⁸⁶ Nonetheless, it took the view that if on the other hand, the undertaking had only “despatched” a message among cartel members, without being active on the same market as them, such conduct could not on its own be regarded as constituting sufficient evidence that the applicant knew or ought to have known of the collusive behaviour adopted by the travel companies⁸⁷ without infringing the general principle of the presumption of innocence.⁸⁸

Thereafter, the Court considered the issue of whether this general principle could be respected if a similar inference had been drawn in the presence of other “indicia” that were consistent with the finding that the online operator in question had known of the content of the message and had had the possibility to rebut that conclusion.⁸⁹ The Court’s answer was affirmative: it was held that the presumption of innocence would have been respected if the travel agents were allowed to show that they either had not received the message or had not read it at all or after a long time had

⁸² Case C-623/15 P, cit. (fn. 45), para. 66; see also para. 48.

⁸³ Case C-74/14, E-Turas and others, [2016] ECR I-42; see e.g. para. 26.

⁸⁴ *Id.*, para. 29.

⁸⁵ *Id.*, para. 38; see also para. 33-34.

⁸⁶ *Id.*, para. 33; see also para. 36.

⁸⁷ *Id.*, para. 34.

⁸⁸ *Id.*, para. 39-40.

⁸⁹ *Id.*, para. 40.

passed since the message had been relayed⁹⁰ on the ground that in these circumstances it could not be established that the company in issue had been aware of the content of the instruction.⁹¹

Importantly, the Court affirmed that a similar conclusion could have also been reached if the undertaking in question had “publicly distanced” itself from the proposed collusive course of action:⁹² nonetheless, it clarified that the manner in which such “public distancing” had taken place should have been assessed on the basis of the circumstances of the case and of the nature of the practice at issue.⁹³ Alongside a “public declaration” or “reporting to the authorities”, other conduct, such as, *inter alia*, “sending an objection” to the system’s administrator or even consistently adopting a policy that was incompatible with the concerted ceiling on discounts could have constituted suitable evidence of such “distancing”, in light of the features of the case.⁹⁴

It is submitted that the E-Turas decision sheds further light on the role and scope of the presumption of innocence in the context of proving the existence of a competition infringement, especially when the conduct of the undertakings concerned forms part of a “complex” arrangement that often does not involve any direct contact between the participants. It is argued that the possibility for an undertaking to rebut any presumption as to its involvement in a cartel, in particular when its involvement was shown to be “marginal” is a key factor in ensuring that an appropriate balance is struck between the principle of effectiveness and the demands of fundamental rights’ protection which in turn require respect for the presumption of innocence. In this specific respect, the Court of Justice’s clear commitment to assessing the nature of the “public distancing” in light of all the features of each case is consistent with this principle and contributes, more broadly, to the meaningful protection of the right to a “fair procedure” enjoyed by undertakings affected by competition investigations.

4. Current approaches to the right to a “fair hearing”: the right of access to the EU Commission file, to have a case decided within a “reasonable time” and the judicial review on competition fines

4.1. The UPS case: defining the scope of the right to be heard in merger cases

The right to be heard and to be able to present one’s own case in the course of competition proceedings is long established in EU law: grounded in the general principle of ‘*audi alteram partem*’,⁹⁵ it now finds a constitutional backing in Article 41 of the Charter of Fundamental Rights, namely the rule guaranteeing the right to a “good administration”.⁹⁶ As such, this right encompasses the entitlement to, *inter alia*, receive a statement of the allegations of anti-competitive behaviour made by the EU Commission against the investigated undertaking, to put forward objections and defences against the Commission’s case and for this specific purpose, to access the “case file”, i.e. all the evidence, whether exculpatory or inculpatory, gathered by the investigating officials.⁹⁷ Pivotal to the effective exercise of the right to be heard is the statement of objections, since it delimits the scope of the administrative procedure initiated by the Commission” and therefore prevents it from “relying on other objections” with a view to finding a competition infringement.⁹⁸ Although it has

⁹⁰ *Id.*, para. 41.

⁹¹ *Id.*, para. 45; see also para. 43.

⁹² *Id.*, para. 46.

⁹³ *Ibid.*

⁹⁴ *Id.*, para. 47-48.

⁹⁵ See e.g. case 17/74, *Transocean Marine Paint Association v Commission*, [1974] ECR 1063, para. 15).

⁹⁶ See *inter alia* case C-469/15, *FSL Holding Ltd v Commission*, Opinion of AG Kokott, 17 November 2016, not yet reported, para. 37; also case C-268/14 P, *Italmobiliare SpA v Commission*, Opinion of AG Wahl, [2015] ECR I-697, para. 34.

⁹⁷ See e.g. case C-413/06 P, *Impala v Commission*, [2008] ECR I4951, para. 61; see also para. 63, 66.

⁹⁸ *Id.*, para. 63.

been recognised that this document is “preparatory” in nature and can therefore be modified in the course of an investigation to, e.g., expunge allegations that had emerged as being unfounded, it is clear that such changes can only be made “in favour of the undertaking concerned”.⁹⁹ If the Commission wishes to raise new allegations, it is obliged to notify a supplementary statement of objection to the investigated parties.¹⁰⁰

It should be emphasised that these principles, that have been developed in the context of the scrutiny of EU antitrust proceedings, have consistently been held to be applicable also to merger review cases, albeit by taking into account the significant differences in the nature of the scrutiny that the Commission conducts in merger as opposed to in cases relating to the enforcement of the EU antitrust rules.¹⁰¹ Consequently, questions may arise as to whether the rights of the notifying parties to be heard in the course of merger proceedings may have the same scope as those recognised to undertakings investigated for antitrust breaches: in particular, should the Commission issue a new statement of objections that reflects changes in its economic assessment of a concentration, perhaps by relying on a different model or methodology?

This question was central to the UPS appeal. In 2013, after a full investigation conducted under Article 8 of the EU Merger Regulation, the Commission declared the merger between UPS and TNT, two major parcel delivery companies, incompatible with the internal market.¹⁰² UPS alleged that the Commission had infringed its rights of defence by adopting an econometric model that was substantially different from the one initially applied in the statement of its objections as to the legality of the concentration.¹⁰³ Since this model was materially divergent from the one notified to them, the merging parties could not challenge its reliability and appropriateness or indeed contest the results arising from its application and propose suitable commitments.¹⁰⁴ In its defence the Commission argued that it was entitled to “revise or supplement the elements of fact or law” at issue in the course of the procedure, especially in light of the parties’ submissions.¹⁰⁵

The General Court allowed the appeal. It was confirmed that the right to be heard and generally, the rights of the defence formed part of the general principles of EU law and indeed of the fundamental rights guaranteed by the EU Charter and that accordingly the notified parties must be allowed “(...) the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim.”¹⁰⁶ On that basis, the Court observed that there were several “non-negligible” discrepancies between the two models, including the use of different variables¹⁰⁷ and the fact that reliance on the “new model” had led to different results and in particular to outcomes inconsistent with earlier allegations made by the Commission meant that the applicants had been deprived, by not knowing about the new methodology, to seek to disprove the findings contained in the decision.¹⁰⁸ Importantly, the Court rejected the Commission’s plea that it would not have been possible to inform the parties of the new methodology due to the demands of speed characterising merger review: while it accepted that these demands should be taken into consideration while reviewing the overall fairness of the proceedings, it took the view that in the circumstances of the

⁹⁹ Ibid.; see also, inter alia, joined cases 142/84 and 156/84, *BAT and Reynolds v Commission*, [1986] ECR 1899, para. 13.

¹⁰⁰ See e.g. Commission Notice on best practices for the conduct of proceedings under Articles 101 and 102 TFEU, [2011] OJ C308/6, para. 112-113.

¹⁰¹ See *Impala*, cit. (fn. 77), para. 62; for commentary e.g., mutatis mutandis, Malinauskaite, “The failing firm defence in EU merger control: the story of Sisyphus?”, (2012) ICCLR 308, p. 312.

¹⁰² Commission Decision C(2013) 431 of 20 January 2013, case COMP/M.6570, *UPS/TNT Express*.

¹⁰³ Case T-194/13, *UPS v Commission*, judgment of 7 March 2017, not yet reported, para. 160-164.

¹⁰⁴ Id., para. 168-169.

¹⁰⁵ Id., para. 180-182; see also para. 175.

¹⁰⁶ Id., para. 199-200.

¹⁰⁷ Id., para. 205; see also para. 207-209.

¹⁰⁸ Id., para. 218-219.

case the passage of time would not have affected the ability of the Commission to notify the change to the parties, since the “econometric analysis was already very stable (...)” well ahead of a key meeting with them.¹⁰⁹

In light of the foregoing, it is argued that the UPS case can be regarded both as a strong restatement of the central role of the rights of defence within the fabric of the EU general principles and as confirmation of their applicability to merger proceedings in a manner that is equivalent to the standards of protection in force for antitrust cases. While the General Court acknowledged that demands typical of the control of concentrations, such as the need to complete the procedure within set deadlines, should be taken into account in assessing the existence of an infringement of these rights, it made clear that the merging entities are entitled to acquaint themselves with the Commission’s allegations and concerns as if they were being investigated for a breach of the competition rules.

4.2. What is an “unreasonable time”? recent developments on the length of EU competition proceedings

The EU Court of Justice has had the possibility to examine issues concerning the length of competition proceedings several times in the past 18 months in light of Article 47 of the EU Charter of Fundamental Rights, which expressly enshrines the right to obtain a decision “within a reasonable time”, whether a case is being investigated by the EU Commission or is sub judice following an appeal to the General Court. In relation to the length of the administrative proceedings, in CEPSA the Court of Justice held that the infringement of the applicant’s right to obtain a decision by the EU Commission “within a reasonable period” could only lead to the annulment of the decision if it could have been demonstrated that the unacceptable delay had adversely affected the exercise of its rights of defence.¹¹⁰

In respect of the question of how the “unreasonableness” or otherwise of the delay should be assessed, the General Court confirmed in the Xellia decision, handed down in September 2016, that this appraisal should take into account “the particular circumstances of each case”, including the “background to the case, the various procedural steps, the complexity of the case” and its importance for the investigated parties.¹¹¹ A distinction was drawn between the investigation of allegations of anti-competitive behaviour, namely the phase in which the EU Commission exercises its fact-finding powers and the administrative phase, which follows the issuing of the statement of objections.¹¹²

The General Court took the view that the “excessive duration” of the investigative phase could prejudice the ability of the investigated parties to exercise their rights of defence in the “formal” hearing, namely after the issuing of the statement of objections, thus justifying the conclusion that their entitlements under Article 47(2) of the EU Charter of Fundamental Rights had been infringed.¹¹³ Nonetheless, it made clear that in order to prove such breach the applicant should have demonstrated that it had experienced “significant difficulties in defending” him or herself from the Commission’s allegations, for instance because due to the delay it could no longer locate and access relevant documents which, in her view, were relevant and decisive for her defence.¹¹⁴

In light of these principles, the General Court examined the applicant’s arguments: it was observed that the Commission had adopted a decision after a period of, respectively, 7 years in total since the first investigative measure had been adopted vis-à-vis Xellia and one year and three

¹⁰⁹ Id., para. 220.

¹¹⁰ Case C-606/13 P, CEPSA v Commission, [2016] ECR I-414, para. 61.

¹¹¹ Case T-471/13, Xellia Pharmaceuticals v Commission, judgment of 8 September 2016, not yet reported, para. 354.

¹¹² Id., para. 356.

¹¹³ Id., para. 357.

¹¹⁴ Ibid.; see also para. 358 and 363-364.

months since the issuing of the statement of objections:¹¹⁵ the investigation had been very complex, had been very complex, with the Commission making repeated requests for information and even conducting a market investigation before being able to formalise its accusations against the applicant and other companies active in the same market.¹¹⁶

Thus, in light of the features of the case and of the complexity of the procedural steps characterising it, the General Court concluded that there had been no infringement of the applicant's rights under Article 47 CFR:¹¹⁷ In its view, since there had been "no period of prolonged inactivity" on the part of the Commission in the course of such a complex procedure, the length of time necessary for the adoption of the decision could not have been regarded as "unreasonable".¹¹⁸ The Xellia judgment also clarified that the legal effect of the conclusion that the Commission had acted with unreasonable delay would have been the annulment of the infringement decision and not a reduction of the fines inflicted on the investigated companies.¹¹⁹ Although the Court acknowledged that it could, in the exercise of its unlimited jurisdiction, review the legality of the financial sanctions and, if required, substitute its own assessment of it, in light of a fresh appreciation of the gravity of the breach and after taking into account factors such as the conduct of the proceedings, it held that it was not under an obligation to do so, especially when, as in the case at hand, the Commission itself had reduced the fine to reflect the length of time it had taken to decide on the allegations.¹²⁰

Recent judgments have also addressed allegations as to the breach of Article 47(2) CFR arising from the *prima facie* undue length of appeal proceedings pending before the General Court: in *Proas*, among others, the Court of Justice held that since proceedings had amounted to almost 5 years and 9 months, with a very lengthy period of inactivity on the part of the General Court itself (4 years and 2 months) which could not be justified "by either the nature or the complexity of the case or by its context",¹²¹ the applicant rights under Article 47 CFR had been infringed. It should however be emphasised that, as it emerges from this and other recent pronouncements, such as, among others the *Villeroy and Boch*¹²² and the *Dornbracht*¹²³ appeal decisions, the consequences of a finding that it had been the inaction of the General Court, as opposed to that of the Commission, to lead to an infringement of the Article 47 rights are significantly different.

As the Court of Justice held in *Dornbracht*, the "sanction" for a breach of the principle that a judgment must be handed down "within a reasonable time" can only be "an action for damages brought before the General Court" lodged in accordance with the conditions laid out in Article 339 TFEU.¹²⁴ In this specific context, it must be emphasised that the finding that there had been "undue delay" in adjudicating the appeal will constitute in itself a "sufficiently serious" breach of EU law for the purpose of establishing liability of the Union.¹²⁵ In order to comply with principles of fairness, however, the General Court, before which this action must be brought, will hear that claim in a

¹¹⁵ *Id.*, para. 361; see also para. 365.

¹¹⁶ *Id.*, para. 365.

¹¹⁷ *Id.*, para. 372.

¹¹⁸ *Id.*, para. 365; see also para. 368-369.

¹¹⁹ *Id.*, para. 372; see also para. 355. See also, *inter alia*, case C-644/13, *Villeroy and Boch SAS v Commission*, judgment of 26 January 2017, not yet reported, para. 79.

¹²⁰ *Id.*, para. 373, 376.

¹²¹ Case C-616/13 P, *PROAS SA v Commission*, judgment of 9 June 2016, not yet reported, para. 83-84.

¹²² Case C-644/13, *cit.* (fn. 99), see e.g. para. 77-78.

¹²³ Case C-604/13 P, *Dornbracht v Commission*, judgment of 26 January 2017, not yet reported, see e.g. para. 97-99.

¹²⁴ *Id.*, para. 97.

¹²⁵ Case C-519/15P, *Trafilerie Meridionali v Commission*, judgment of 14 September 2016, not yet reported, para. 67.

composition other than the one that was charged with the “dispute which gave rise to the procedure whose duration is criticised”.¹²⁶

The above approach as regards the “policing” of undue delays in the adjudication of the EU Court of Justice may be usefully compared with the position of the European Court of Human Rights in similar cases. According to the Strasbourg Court, the reasonableness of the duration of proceedings can only be assessed in light of the circumstances of the case at hand, of its complexities and of the conduct of the parties as well as of the competent court.¹²⁷ In addition, for there to be compliance with the ECHR requirements, the applicant must have an “effective remedy” for the protection of his or her right to obtain justice within a “reasonable time”.¹²⁸ In this specific context, the Human Rights Court held that while it is up to the contracting parties to identify and design a “remedy” for the infringement of this right, the former must be “effective in practice as well as in law” and therefore be capable of “dealing with the substance of an “arguable complaint” based on the ECHR and “to provide appropriate redress”.¹²⁹ Thus, the Court accepted that, while an “effective remedy” could be “compensatory” as well as “preventive”, it should have been suitable, in any case, to “(...) either (...) preventing the alleged violation or its continuation, or (...) providing adequate redress for any violation that had already occurred.”¹³⁰

In light of the forgoing, it is concluded that the approach adopted by the EU Court of Justice in the Villeroy and Dornbracht decisions remains broadly compatible with the ECHR standards on the ground that applicants can seek compensation for any damage arising to them as a result of the undue length of judicial proceedings before the General Court by lodging an action in Luxembourg in accordance with Article 339 TFEU.¹³¹

4.3. Reviewing competition fines: between legal certainty, deterrence and the right to equal treatment

The scope and function of the judicial review powers enjoyed by the EU Court of Justice and especially by the General Court vis-à-vis competition infringement decisions has been at the forefront of the debate concerning the compliance of Union public enforcement with relevant human rights standards. To what extent can the unlimited jurisdiction as regards the dimension of fines, coupled with the limited review as regards the substance of the decision, enjoyed by the General Court be regarded as providing a truly “fair trial” to the investigated parties? These issues are especially relevant when it comes to scrutinising the way in which the EU Commission ascertained the existence and consequently the applicability of aggravating and attenuating circumstances in complex cartel cases. Applicants have often argued that the way in which the Commission did so did not conform to the principle of equal treatment, for instance by refusing to reduce a financial penalty when the cooperation offered was not regarded as sufficiently significant.

The Court of Justice held in the Repsol judgment, handed down in June 2016,¹³² that the “on-the-merits” review of competition sanctions was an essential element of the right to the effective judicial protection, enshrined in Article 47 of the EU Charter of Fundamental Rights: thus, the

¹²⁶Case C-604/13P, cit. (fn. 103), para. 98; see also Villeroy and Boch, cit. (fn. 99), para. 78; Proas, cit. (fn. 101), para. 82.

¹²⁷ See e.g. appl. no 23959, Janssen v Germany, judgment of 20 December 2001, available at: <http://hudoc.echr.coe.int/eng?i=001-60001>, para. 40.

¹²⁸ See inter alia appl. no 30210/96, Kudla v Poland, judgment of 26 October 2000, available at: <http://hudoc.echr.coe.int/eng?i=001-58920>, para. 157; see also Appl. No 63235/00, Eskelinen v Finland, judgment of 19 April 2007, available at: <http://hudoc.echr.coe.int/eng?i=001-80249>, para. 81-83.

¹²⁹ Appl. no 48333/99, Kangasluoma v Finland, judgment of 20 January 2004, available at: <http://hudoc.echr.coe.int/eng?i=001-61588>, para. 46.

¹³⁰ Eskelinen, cit. (fn.108), para. 81; see also Kangasluoma, cit. (fn. 109), para. 21-22, 48.

¹³¹ See inter alia, mutatis mutandis, case C-411/15, Timab v Commission, judgment of 12 January 2017, not yet reported, para. 165-171.

¹³² Case C-617/13, Repsol and others v Commission, [2016] ECR I-416.

General Court is “bound (...) to examine all the complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity and duration of the infringement”.¹³³ The Court of Justice, on its part, is not empowered to “substitute, on grounds of fairness, its own assessment for that of the General Court” as regards these questions: unless it could be shown that the penalty being challenged was “not merely inappropriate but also excessive to the point of being disproportionate”, the Court of Justice would not rule that the judgment at first instance had been erroneous in law.¹³⁴

In the *Roca Sanitario* judgment, delivered in January 2017, the Court of Justice had the opportunity to consider the related question of the scope of this unlimited jurisdiction vis-à-vis claims that the Commission’s fines had infringed the right to equal treatment. The Court of Justice reiterated that this constituted a general principle of Union law as a result of which a fine imposed for the breach of the competition rules should be determined in a way that does not discriminate between undertakings that have participated in the same infringement unless a difference in their treatment can be objectively justified.¹³⁵ The Court acknowledged that the sanction imposed on the members of the same cartel could well differ in light of the way in which each was involved in the practice, of the “economic significance” of the breach and of the contribution that each member made it—a contribution that could be measured, *inter alia*, on the basis of the “value of sales” made by every infringer as a result of the illegal practice.¹³⁶

However, the Court, dismissing the appeal, held that the Commission was under no obligation to take into account the differing manner of involvement of each firm at a particular stage of the procedure—for instance, while quantifying the “basic amount” of the penalty.¹³⁷ It was held that the Commission could rely on a number of tools for this purpose: these included not just the “multipliers” reflecting the gravity and duration of the infringement, which in accordance with the Commission’s Fining Guidelines affected directly the sanction’s “base line”,¹³⁸ the application of the “aggravating” and “attenuating circumstances” that may be relevant in light of the features of the case and, finally, the “multiplying factor” aimed at reflecting the need to deter future infringements.¹³⁹

A similar approach was also applied in the *Dornbracht* judgment: the Court of Justice first confirmed that “the conduct of each of the undertakings”, the [part they played in the restrictive practice, “the profit which they were able to derive from it, their size, the value of the goods concerned” and the extent to which the breach threatened the EU’s objectives should all play a part in determining the size of the fine inflicted on each cartel member.¹⁴⁰ On that basis it rejected the applicant’s argument that its right to equal treatment had been infringed. The Court held that the simple fact that the “multipliers” that reflected the gravity of the breach and in particular its scope had been set at the same rate for all participants, even for those whose role had had a larger geographic impact, could not be regarded on its own as being incompatible with this principle.¹⁴¹ In its view, “the taking into account (...) of the differences between the undertakings that have participated in a cartel (...) need not necessarily occur when the multipliers (...) are set” but could have occurred at another stage in the process for the determination of the penalties to be applied to each cartel participant.¹⁴²

¹³³ *Id.*, para. 86.

¹³⁴ *Id.*, para. 82; see also para. 81. See also, more recently, *inter alia*, case C-636/13, *Roca Sanitario v Commission*, judgment of 26 January 2017, not yet reported, para. 46-47.

¹³⁵ Case C-636/13, *cit.* (fn. 114), para. 57.

¹³⁶ *Id.*, para. 59-60.

¹³⁷ *Id.*, para. 61, 63.

¹³⁸ *Id.*, para. 67-68. See Commission Guidelines on the method of setting of fines in accordance with Article 23(3) of Council Regulation No 1/2003, [2006] OJ C210/2, para. 19-22, 25.

¹³⁹ Case C-636/13, *cit.* (fn. 114), para. 59-60; see also para. 63, 70-72.

¹⁴⁰ Case C-604/13 P, *cit.* (fn. 103), para. 68.

¹⁴¹ *Id.*, para. 75-76.

¹⁴² *Id.*, para. 78-79.

It must be emphasised that a similar approach has also influenced the General Court's review of decisions granting full or partial immunity from fines following the filing of leniency applications. In, among others, the *Deutsche Bahn* decision,¹⁴³ the General Court confirmed that it had jurisdiction to assess whether, as a result of an application for leniency, the information obtained by the Commission "would have enabled [it] (...) to carry out a targeted inspection in connection with an alleged cartel."¹⁴⁴

On that basis, the Court rejected the allegation that the Commission had wrongfully granted partial immunity to the applicant: it took the view that contrary to the allegations made on appeal, the information obtained was capable of "(...) providing reasonable grounds for suspecting the existence of an infringement".¹⁴⁵ Importantly, the General Court emphasised that the fact that the General Court enjoyed "unlimited jurisdiction" vis-à-vis the review of competition fines allowed it to order the submission of and to evaluate the information originally submitted by the leniency applicants to the Commission, so as to satisfy itself that the latter had correctly applied the rules enshrined in its Leniency policy.¹⁴⁶

In light of the foregoing analysis it may be concluded that the General Court, thanks to its unlimited jurisdiction, has held the Commission to stringent standards of legality as regards the quantification of the fines to be imposed on individual infringers: whether by adjudicating on appeals concerning complex, multi-party cases, or by reviewing the way in which whistleblowers had been "rewarded" for their cooperation, the Court has ensured that the Commission practice would be predictable and consistent with the principle of proportionality in the determination of fines.

4.4. Settlement procedure and the rights of the investigated undertakings: the *Timab* appeal

The settlement procedure, disciplined by Article 9 of Council regulation No 1/2003, represents another effective tool through which the EU Commission can seek to bring competition infringements to an end. In the *Timab* appeal decision, handed down in May 2015,¹⁴⁷ the General Court had been faced with the question of what the consequences are of an "aborted settlement" for the undertaking or undertakings involved in the discussions: would it be contrary to the principle of equal treatment if the Commission, after some but not all the participants to a complex cartel had withdrawn from negotiations, proceeded to inflict sanctions on the former that were markedly different from either the fines predicted in the course of the settlement process or those later inflicted on the settling undertakings?¹⁴⁸

The General Court had taken the view that it would not be incompatible with this general principle of EU law if the Commission had imposed a "higher fine than the one with which it had (...) threatened" the applicant during the discussions¹⁴⁹ on the ground that in an "ordinary" infringement procedure the Commission was not bound by the initial "offer of a settlement" but only by the statement of objections which did not contemplate any indications as regards the sanctions that the investigated undertaking could expect¹⁵⁰ and therefore retained its usual discretion as regards the setting of the fine to be inflicted on the applicant.¹⁵¹ The Court also rejected the allegation that the infringement decision had been adopted in defiance of the right against self-incrimination: in its

¹⁴³ Case T-267/12, *Deutsche Bahn v Commission*, judgment of 29 February 2016.

¹⁴⁴ *Id.*, para. 315.

¹⁴⁵ *Id.*, para. 318.

¹⁴⁶ *Id.*, para. 392-393.

¹⁴⁷ Case T-456/10, *Timab and another v Commission*, [2015] ECR II-296.

¹⁴⁸ See para. 72; see also para. 80-81.

¹⁴⁹ *Bombois and Oliver, Competition and Fundamental Rights*, (2016) 7(10) JECLAP 711 at 721; see *Timab*, cit. (fn. 127), para. 105; see also para. 67-68.

¹⁵⁰ *Timab*, cit. (fn. 127), para. 96, 98-99; see also para. 120.

¹⁵¹ *Id.*, para. 100; see also para. 122.

view, the voluntary nature of the settlement procedure could not be affected by the later withdrawal of an undertaking from the negotiations.¹⁵²

In its January 2017 decision the Court of Justice confirmed the first instance judgment:¹⁵³ in respect of the argument that the applicant's right not to incriminate oneself had been infringed, the Court reiterated that due to the voluntary nature of the "cooperation" that engaging in settlement discussions entailed, the Commission had been entitled to take into account the applicant's proposals for the purpose of ascertaining the existence of a breach and of determining the sanction for it.¹⁵⁴ In its view, the absence of any "compulsion" on the applicant meant that the privilege against self-incrimination would not be applicable.¹⁵⁵ The appeal judgment also confirmed that the applicant's right to equal treatment had not been infringed: it was held that once Timab had withdrawn from the settlement negotiations, the procedure had followed the ordinary rules for infringement proceedings and that in that context the Commission had fully respected the applicant's due process rights.¹⁵⁶ As regards the size of the fine inflicted on the applicant, the Court reiterated that, following the withdrawal from negotiations, the Commission's discretion was subjected to the rules enshrined in Article 23 of Council Regulation No 1/2003, as interpreted, *inter alia*, in light of the "ordinary" fining guidelines, and was no longer bound to any estimate that it may have offered as part of the settlement discussions.¹⁵⁷

It is suggested that the Timab appeal is very likely to have a significant impact on the legal approach to the nature of the settlement procedure as well as on the scope of the right against self-incrimination. Having regard to the former issue, it is clear from the Court of Justice's conclusions that the negotiation of a settlement must be kept separate from the infringement decision. Thus, while the interruption of discussions between investigated firms and the Commission may lead to the initiation of a "normal" enforcement procedure, the Commission, once this occurs, is no longer bound either to maintaining its "promises" concerning the likely amount of any fines it may impose on the undertakings or to taking into account the sanctions envisaged for other cartel members who may have chosen to continue negotiation and thereby to secure a settlement.¹⁵⁸ As to the Court of Justice's conclusions as regards the reach of the right not to incriminate oneself, it emerges from this decision that under EU competition law the offering of commitments is treated as a form of "cooperation" with the Commission, along the lines of, e.g., the submission of a leniency application. Thus, it should be emphasised that so long as this is done voluntarily, the right in question will not apply, regardless of whether commitments are actually entered into or whether the Commission, following the interruption of discussions with the investigated party, decides to pursue an ordinary infringement case.

It is acknowledged that this approach remains broadly compatible with, *inter alia*, the one adopted by the European Court of Human Rights as regards the compliance of national plea-bargaining procedures with Article 6 ECHR: it was held in, *inter alia*, the *Natvlishvili* decision that the right to a fair trial does not prevent an accused from waiving some of his or her procedural rights voluntarily,¹⁵⁹ so long as the waiver was entirely voluntary, entered into "in an unequivocal manner and (...) attended by minimum safeguards" as well as not running contrary to important public interests.¹⁶⁰ Nonetheless, whereas it could be argued that the investigated firm had been duly

¹⁵² *Id.*, para. 76-79; see also para. 120.

¹⁵³ Case C-411/15P, *Timab v Commission*, [2017] ECR I-11.

¹⁵⁴ *Id.*, para. 84, 87.

¹⁵⁵ *Id.*, para. 86.

¹⁵⁶ *Id.*, para. 136; see also para. 139.

¹⁵⁷ *Id.*, para. 140; see also para. 153, 158.

¹⁵⁸ See *mutatis mutandis*, *Timab* (General Court judgment), *cit.* (fn. 127), para. 80-82; also for commentary *Bombois et al.*, *cit.* (fn. 129), p. 721.

¹⁵⁹ Appl. No. 9043/05, *Natvlishvili v Georgia*, judgment of 29 April 2014, available at: <http://hudoc.echr.coe.int/eng?i=001-142672>; see para. 91-92.

¹⁶⁰ *Ibid.*; see also para. 93.

served with a statement of objections and had been able to put forward its defence to the Commission's allegations, it may be objected that drawing such a stark distinction between Article 9 proceedings and an ordinary infringement case appears formalistic, to the point of potentially being inconsistent with the need to protect effectively the undertakings' rights of the defence.

5. Competition enforcement and fundamental rights—a year in review

The past 18 months have seen a good level of judicial activity in respect of questions arising from the interplay between fundamental rights' protection and the enforcement of the EU competition rules. While these judgments have addressed an array of issues, it is apparent that some common themes emerge: these are, among others, the interpretation of the right to a "fair hearing" and to a decision within a "reasonable time", both at administrative and, perhaps more importantly, at judicial level, the ongoing debate on whether and at what conditions members of the same corporate group as a competition infringer should be held responsible for the latter's illegal conduct and whether, more generally, there may be other cases in which the requirement that liability for antitrust breaches be "personal" could be waived, as envisaged in the E-Turas case. The scope of the right not to incriminate oneself and the complex impact of the functioning of the ECN on due process standards, as well as how the demands of effective enforcement can be reconciled with the recognised need for well-functioning leniency programmes were also examined.

While it is difficult to draw unitary conclusions from the above, it is submitted that the EU Court of Justice has been rather proactive in linking the interpretation of the single "components" of the right to a "fair hearing", even in a composite procedure such as the one for the enforcement of the EU competition rules, to the overarching provisions of Articles 41 and 47 of the EU Charter of Fundamental Rights, namely the right to "good administration" and to an effective remedy and a fair trial, as well as to the observance of other key principles, such as the right to equal treatment. It is therefore expected that as similar issues continue to emerge, the Commission's practice will be subjected to painstaking scrutiny to ensure the full respect of the Union's human rights standards.